

**Lee Sew Kai v Menteri Dalam Negeri,
Malaysia & Ors**

HIGH COURT (JOHORE BAHRU) — CRIMINAL
APPLICATION NO 54-4 OF 1988
ABU MANSOR J
12 MARCH 1989

Evidence — Cross-examination on affidavit evidence — Court's discretion to allow cross-examination — Principles governing exercise of discretion

Criminal Procedure — Cross-examination on affidavit evidence — Court's discretion to allow cross-examination — Principles governing exercise of discretion

Preventive Detention — Habeas corpus — Cross-examination on affidavit evidence

The applicants had applied for a writ of habeas corpus, and after affidavits had been filed, applied for the presence of the applicant's officer for the purpose of cross-examination on his affidavit. The respondents resisted the application on the ground that evidence in this matter is by affidavit, and urged the court that it must be shown that it is relevant to the proceeding before it can be allowed. The applicant contended that the main ground of his habeas corpus application was that he was not informed of his arrest, in contravention of art 5(3) of the Constitution. He challenges the truth of the arresting officer's affidavit, and submitted that the arrest was not made in good faith.

Held, allowing the applicant's application:

(1) The arresting officer's affidavit in respect of the arrest, viewed in the light of the applicant's wife's affidavit, could not stand on its own. Several questions arise that needed answering, in order to determine who is telling the truth.

(2) The applicant's wife in this case had made some pertinent allegations; the relevance of the answers given by the arresting officer is in helping to establish whether he did inform the applicant of the reason for his arrest.

[*Editorial Note*: The respondents' appeal to the Supreme Court vide Criminal Appeal No 05-16 of 1989 was heard on 23 October 1989. The appeal was allowed.]

Cases referred to

- 1 *Yit Hon Kit v Minister of Home Affairs, Malaysia & Anor* [1988] 2 MLJ 638 (refd)
- 2 *N Madhavan Nair v Govt of Malaysia* [1975] 2 MLJ 286 (dstd)
- 3 *Inspector-General of Police & Anor v Lee Kim Hoong* [1979] 2 MLJ 291 (dstd)

Legislation referred to

Federal Constitution art 5(3)

Teh Poh Teik for the applicant.

Mohd Raus bin Shariff (Senior Federal Counsel) for the respondent.

Cur Adv Vult

Abu Mansor J: On 19 February 1989 I made an order allowing the application of the applicant requiring the presence of Inspector Abdul Majid bin Mohd Ali for the purpose of cross-examination on his affidavit on 15 April 1989. The learned public prosecutor is dissatisfied with

A that decision and hereby appeals. The appeal raises a question and turns on the correctness of the exercise of the court's discretion to make such an order.

The facts of the case are as follows. By a notice of motion dated 1 November 1988, the applicant applied for an order that a writ of habeas corpus be issued to direct the respondents to produce the applicant before this court and to show cause why the applicant should not be set at liberty or released forthwith on the grounds shown in the affidavit filed in support. The application is supported by the affidavit of Kor Cheng Gek alias Khor Cheng Gek, the wife of the applicant (encl 2). The respondents filed affidavits in answer to the one filed on behalf of the applicant. The affidavits that concerned us in this appeal is the affidavit of Inspector Abdul Majid bin Mohd Ali affirmed on 7 December 1988 (encl 14).

By a notice dated 2 January 1989, the applicant applied for the presence of Inspector Abdul Majid bin Mohd Ali for the purpose of cross-examination of the said affidavit. The matter came up for argument on 19 February 1989.

Mr Teh Poh Teik for the applicant in his application contended that the main ground of his habeas corpus application was the allegation that the applicant was not informed of his arrest, therefore contravening art 5(3) of the Federal Constitution. He said Inspector Abdul Majid was the applicant's arresting officer at the material time. He submitted that in reply to the applicant's affidavit, Inspector Abdul Majid, in para 3 of his affidavit (encl 14), said immediately after he arrested the applicant he informed him of the reason for his arrest. The applicant's counsel contended that the applicant challenges the truth and the contents of the said affidavit. Counsel then referred to the affidavit of the applicant's wife (encl 2) where she alleged as follows:

- G 1 In October 1984 the applicant was brought by Inspector Abdul Majid to the police station at Alor Setar and the applicant was released two hours later at 3am.
- 2 From October 1984 to 13 September 1987, the date of his second arrest, there was absolutely no interference from the police whatsoever.
- H 3 On 12 September 1987, however, Inspector Abdul Majid and two police officers called at the applicant's house to visit the applicant between 1 and 2pm and told the applicant they would visit the applicant the next day.
- 4 On 13 September 1987 at 4pm Inspector Majid came but the applicant was not in.
- I 5 On 13 September 1987 Inspector Majid came again at 7pm. The deponent/wife says Inspector Majid wanted the applicant to have dinner with them. The applicant went out for dinner and only then the deponent realized that the applicant had been arrested.

The applicant's counsel submitted that the facts as al-

luded to by the applicant has never been challenged by the respondent. He submitted further that on those facts, if believed, the arrest was therefore not made in good faith. He suggests that it was made mala fide. Counsel therefore applied for Inspector Majid's presence for cross-examination. He cited *Yit Hon Kit v Minister of Home Affairs, Malaysia & Anor*,¹ where Edgar Joseph Jr J allowed cross-examination of a witness in a similar situation where the applicant alleged that he had not been informed of the reason for his arrest.

Encik Mohd Raus for the respondent objected to the application for cross-examination. He contended that evidence in this matter is by affidavit. No doubt the maker can be cross-examined as the cited case suggests but he urged the court not to take the case as a general rule. It must be shown it is relevant to this proceeding before it can be allowed.

The senior federal counsel urged the court to distinguish *Yit Hon Kit v Minister of Home Affairs, Malaysia & Anor*.¹ In *Yit's* case,¹ the senior federal counsel argued that no evidence was disclosed in the affidavit that applicant was informed of his arrest. At p 639 of the said judgment, it is stated that he was only acting on instruction. The reason why the cross-examination of the witness, PC Hosni, was allowed was to confirm that the applicant therein was not informed of the reason for his arrest. On the other hand in our present case, senior federal counsel contended there is the affidavit of Inspector Abdul Majid at para 3 of encl 14 stating that the applicant was informed of his arrest. He urged the court to find that the applicant must show reasons why cross-examination was necessary. If counsel wishes to argue on mala fide, this could be done in the main argument. He contended that just because there is no reply to the facts alleged in the wife's affidavit, that should not form the ground for allowing cross-examination. In his opposition to the applicant's application, the senior federal counsel cited *N Madhavan Nair v Govt of Malaysia*² at p 289 where an application to cross-examine a deponent was denied. He also cited *Inspector-General of Police & Anor v Lee Kim Hoong*³ where a cross-examination of Encik Ghazali bin Haji Abdul Hamid, assistant secretary to Parliament, was refused. Counsel says no useful purpose is served by allowing the cross-examination of the Inspector.

I considered whether I should allow the application for cross-examination. I think it is settled law that it is an exercise of a discretion applying judicial principles. I decided to allow it as it is relevant.

The ground on which the applicant seeks to challenge the detention order as referred to earlier is that the arresting officer, Inspector Abdul Majid bin Mohd Ali, did not inform the applicant of the reason for his arrest. In the applicant's wife's affidavit (encl 2) she alleged that Inspector Abdul Majid came, invited and then took the applicant to have dinner. She is in fact saying in affidavit

A there was no question of the applicant being arrested when police came. The arrest took place after that and was mala fide.

No doubt in para 3 of Inspector Abdul Majid's affidavit (encl 14), he made a statement that the applicant was informed of the reason for his arrest; I find that Inspector Abdul Majid's affidavit in respect of the applicant's arrest when viewed in the light of the applicant's wife's affidavit no longer stands on its own. Several questions arise that needs an answering. In the first place, what is the truth of what is stated by her that the applicant was not arrested but taken to dinner by Inspector Abdul Majid? It is basic in affidavit evidence that that which is not denied is deemed to be admitted. The respondent never denied the wife's affidavit surrounding the applicant's arrest. If the applicant's wife's evidence is true then where and when was the applicant arrested? If we were to take Inspector Abdul Majid's evidence as in his affidavit, what is the truth now in the face of the applicant's wife's allegation? In this case who is telling the truth?

I am of the view the two cases cited by the senior federal counsel were of no assistance. In the case of *N Madhavan Nair v Govt of Malaysia*,² cross-examination of the witness was disallowed because the applicant was not in a position to put facts before the deponent but only relied on challenges and so his application had no merit. The other ground relied was there was no satisfactory explanation as to the loss of the original ordinance which the judge did not consider relevant. While in the case of the *Inspector-General of Police & Anor v Lee Kim Hoong*,³ the applicant wanted Encik Ghazali to explain what happened after the Paper had been laid before Parliament where it was not relevant, and it was disallowed also on the ground that the validity of any proceedings in Parliament shall not be questioned in any court.

On the other hand in our present case, the applicant's wife had made some pertinent allegations which must not remain unanswered. The relevance of the answers given by Inspector Abdul Majid bin Mohd Ali in cross-examination will finally help to establish whether he did inform the applicant of the reason for his arrest. If he did, where did he do so? Was it at the applicant's house? As it stands at present, it does not remain unchallenged in the light of the applicant's wife's sworn affidavit which says that Inspector Abdul Majid did not go there to effect arrest of the applicant but to invite him to a dinner and such sworn testimony was not replied to by the respondent.

I find the application to have merit and I duly allowed it. The respondent appeals against the ruling.

Application allowed.

Solicitors: *Abdul Raman Saad & Associates.*

Reported by *Zarinah Marican*